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Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF FLORIDA,

Petitioner,

v.

PEDRO A. CRUZ,

Respondent.

and

STATE OF FLORIDA,

Petitioner,

v.

THADDEUS TYRONE HOLLIDAY,
Alvin Leon Townsend and
James Willie Jackson,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND APPENDIX

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

Whether the decisions of the Florida Supreme Court in the instant cases adopting an objective test for entrapment purportedly based on Justice Roberts' concurring opinion in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) and Justice Frankfurter's concurrence in Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) is in fact in conflict with this Court's decisions in Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) and United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1974)?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as Cruz v. State, __ So.2d __ (Fla. 1985) and appears in the appendix at A 1 - 34.

The opinion of the District Court of Appeal, Second District of Florida is reported as State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983) and appears in the appendix at A 35 - 46.

The opinion of the Florida Supreme Court is reported as State v. Holliday, __ So.2d __ (Fla. 1985) and appears in the appendix at A 47 - 48.

The opinion of the District Court of Appeal, First District of Florida is reported as State v. Holliday, 431 So.2d 309 (Fla. 1st DCA 1983) and appears in the

appendix at A 49 - 59.

JURISDICTIONAL STATEMENT

On March 7, 1985 the Supreme Court of Florida quashed an order of the District Court of Appeal, Second District of Florida which had reversed the trial court's dismissal of an information charging Respondent Cruz with grand theft. On the same date the Florida Supreme Court approved the First District's opinion in Holliday which dismissed informations of grand theft based on a finding of entrapment as a matter of law.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a capital Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States provides inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without

> due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C. §2257 provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decison could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, commission held or authority exercised under, the United States.

U.S. Sup. Ct. Rule 19.4, 28 U.S.C.A.

> Parties interested jointly, severally, or otherwise in a judgment may join in a petition for a writ of certiorari therefrom; or any one or more of them may petition separately; or any two or more of them may join in a

petition. When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

STATEMENT OF THE CASE

Respondent, Pedro A. Cruz, was charged by direct information in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida with grand theft in violation of §812.014 (2)(b) Florida Statutes (1981), said charge arising from an incident occuring on March 1, 1982 in Hillsborough County, Florida. On May 14, 1982 Cruz filed a motion to dismiss the information pursuant to Rule 3.190(c)(4), Florida Rules of Criminal Procedure. The motion contained the following sworn facts:

1. On March 1, 1982, certain members of the Tampa Police Department, specifically, Officer Tommy Ellis, Officer John L. Counsman, Officer George L. Lease, Officer P. Saladino, and Officer M. D. Johnson, were conducting a decoy operation

in the area of West Kennedy Boulevard and Brevard Street.

2. As part of said operation, Officer Tommy Ellis was dressed as a low income individual wearing blue slacks, a torn checked coat and a golf hat and was the decoy in the operation.

3. Officer Ellis was simulating a state of intoxication, to wit: he was doused with alcohol, pretending to be drinking wine from a bottle, and was coughing and belching.

4. Officer Ellis was stationed near an alleyway, leaning against a building with his face to the building, and displaying currency in the amount of $150.00, the bills being paper-clipped together, from his right rear pants pocket.

5. The other officers involved in the operation were stationed in

surrounding locations and were to provide back up assistance in apprehending anyone who may lift the money from the decoy's pocket.

6. At some time after 10:00 p.m., Officer Saladino, who was stationed in an alleyway by the decoy, observed the Defendant and a white female walking west on Kennedy Boulevard.

7. Officer Saladino testified at a deposition taken at the Office of the Public Defender on May 13, 1982, that it appeared that the Defendant approached the decoy and perhaps attempted to speak to him and then walked away from the decoy.

8. Approximately ten to fifteen minutes after that time, Officer Saladino testified that he observed the Defendant and the white female return to the location of the decoy, the Defendant paused a

short time and then lifted the money from the decoy's pocket without physically harming the decoy in any way.

9. The Defendant then proceeded westbound on Kennedy Boulevard and was, without making any attempt to elude the officers, then apprehended by several officers.

10. The Defendant was placed under arrest and charged with grand theft.

11. On March 22, 1982, the State of Florida then filed an Information charging the Defendant with grand theft under Florida Statutes 812.014(2)(b).

12. Officer Saladino testified that none of the unsolved crimes occuring near this location involved the same modus operandi as the simulated situation created by the officers.

13. Officer Saladino, Officer

Counsman, and Officer Johnson testified at depositions taken on May 13, 1982, that the decoy operation was not set up to catch any particular individual.

14. Said officers further testified that they had not observed the Defendant being engaged in any criminal activity prior to the time the money was taken from the decoy, had no knowledge that the Defendant had previously engaged in similar theft related crimes, had no knowledge of any crmminal record for the Defendant and had no knowledge of any reputation of the Defendant for criminal activities. (R 4, 5)

The Circuit Court, relying on the then controlling decision in State v.

Casper,[1] 417 So.2d 263 (Fla. 1st DCA 1982), granted the motion to dismiss on May 26, 1982. The State of Florida appealed to the District Court of Appeal, Second District of Florida.

Arguments in the Second District focused on whether a defendant's predisposition or lack thereof was a jury question or whether predisposition could be determined by a trial judge on a motion to dismiss as the First District Court of Appeal had determined in Casper, supra. In a written opinion filed February 25, 1983, the Second District reversed the trial court's order granting the motion to

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[1] The Casper court, relying in part on United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) and Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) had held a similar police decoy operation constituted entrapment as a matter of law.

dismiss and remanded this cause to the trial court for further proceedings. State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983) (A 35 - 46). At this point, Cruz, through counsel filed a timely notice to invoke the discretionary jurisdiction of the Florida Supreme Court. That Court accepted jurisdiction on July 12, 1983.

Respondents Thaddeaus Tyrone Holliday, Alvin Leon Townsend and James Willie Jackson were arrested on April 18, 1981, October 16, 1981 and October 16, 1981 Respectively. Each was subsequently charged with grand theft in violation of Section 812.014, Florida Statutes. A motion to dismiss pursuant to Rule 3.190(c)(4), Florida Rule of Criminal Procedure was filed on each defendant's behalf and the State filed a traverse and demurrer.

The motions were jointly heard in

the Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida. The trial judge entered three separate orders grantig the motions to dismiss without making either findings of fact or conclusions of law. The State appealed the three orders to the First District Court of Appeal.

On appeal the State argued inter alia, under the circumstances of these cases there was no entrapment under the standard espoused in Hampton v. United States, supra; Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); United States v. Russell, supra and Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

The circumstances, as outlined in the Holliday district court opinion, include the fact that a special unit of the Jacksonville sheriff's office used a decoy

operation on North Main Street in that city to investigate robberies and thefts. There had been several robberies and purse snatchings in the general area. The decoy dressed in old clothing, doused with alcohol and lay semi-prone on the sidewalk. Bills totalling $150.00 were placed in the decoy's rear pants pocket and were visible to passersby. The decoy pretended to be unconscious and was unresponsiove to any physical or verbal acts toward him.

Respondent Holliday walked back and forth several times, then he reached down and took the exposed money. Holliday ran away but was apprehended a short distance down the street. He threw down the money and admitted taking it bacause he was broke. Respondent Townsend likewise took exposed money from the pocket of a decoy. However, the decoy in this case did not

douse himself with alcohol or appear intoxicated. The decoy in the Jackson case also was not doused with alcohol.

None of the three defendants were suspected of any thefts of this kind. Jackson had no prior arrests, and Townsend had been arrested for burglary some two years prior but the case had been dropped. Several robberies and thefts had occured in that area involving suspects of Holliday's general description. The prior incidents involved similar victims and modus operandi. Police statistics indicated most people tried to aid the decoy, and less than 50% of contacts with the decoy resulted in thefts.

The district court relied on State v. Casper, supra, to affirm the trial court's granting of the motions to dismiss. As previously stated the Casper

court relied heavily on Hampton v. United States, supra and United States v. Russell, supra The State of Florida sought discretionary review on the Holliday decision in the Florida Supreme Court.

On March 7, 1985, the Florida Supreme Court entered written opinions quashing the decision of the Second District and affirming the First District.

In its opinion, the Florida Supreme Court determined that there were, in fact, two tests for entrapment. The traditional or "subjective" test focusing on an individual's predisposition to commit the crime for which he claimed entrapment as set forth in Sorrells v. United States, supra, and its progeny. The Florida Supreme Court opined that the district court of appeal had properly found predisposition to be a jury question. The Court went on to adopt a novel "objective" test for entrapment.

REASONS FOR GRANTING THE WRIT

THE DECISIONS BELOW, HOLDING THAT THERE IS AN OBJECTIVE TEST FOR ENTRAPMENT FOCUSING ON POLICE CONDUCT RATHER THAN AN INDIVIDUAL DEFENDANT'S PREDISPOSITION CNSTITUTES AN UNWARRANTED EXPANSION OF THE ENTRAPMENT DEFENSE CONTRARY TO THIS COURT'S DECISIONS IN HAMPTON V. UNITED STATES, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) and UNITED STATES V. RUSSELL, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1974).

In the instant cases, the Florida Supreme Court reached the question of state law properly before it, deciding that a defendant's predisposition or lack thereof is a jury question and went on to adopt a new objective test of entrapment, purportedly grounded on federal due process principles. An examination of the Florida court's rationale for its decision reflects that court has, for all practical purposes, adopted Justice Brennan's

dissent in Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) at 48 L.Ed.2d 122 - 125. The Florida Supreme Court ignores the fact that five members of this Court declined to join in Justice Brennan's opinion in Hampton.

In acting as it did, the Florida court disregards this Court's holding in United States v. Russell, 411 US. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) that:

> [T]he entrapment defense prohibits law enforcement officers from instigating a criminal act by persons otherwise innocent in order to lure them to its commission and punish them. Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime. Id. at 411 U.S. 428, 429.

The objective test fashioned in Cruz provides that trial judges shall make a preliminary inquiry into the propriety of law enforcement activity whenever an

entrapment defense is raised to determine whether that activity "(1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to aprehend those involved in the ongoing criminal activity." Cruz v. State, __ So.2d __ (Fla., Case No. 63,451, March 7, 1985).[2] (A 1, 21, 22) In short, unlike their brethren in the federal judiciary or sister states, Florida's judiciary may now exercise a chancellor's foot veto over law enforcement practices of which it does not approve. Cf. United States v. Russell, supra; Hampton, supra.

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[2] It is interesting to note that the Florida Supreme court rejected this very approach to the entrapment defense, in reliance on United States v. Russell, supra, in State v. Dickinson, 370 So.2d 762 (Fla. 1979). The Cruz court preferred to ignore rather than reconcile its conflicting precendent.

The impact of the Florida Supreme Court's decisions in the instant cases extends far beyond their facts, for it must be presumed that all under cover police activity, whether in the narcotics arena, ABSCAM-type operations, or simple attempts to control crime at the street level as occured in the instant cases are now suspect. The ABSCAM operation which ensnared a Florida congressman could not be undertaken by state law enforcement officers in Florida today. See United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983)

This state is often referred to as a gateway to the United States for drug traffickers. State narcotic and corruption investigations will be drastically curtailed if the decisions in these cases are allowed to stand, and yet, what Florida can no longer do to protect itself

from crime, federal officials remain free to undertake within the boundaries of this state. In fact, federal authorities will be forced to step in to fill the void. Florida criminals will now defend themselves in federal forums placing an additional strain on an already overburdened federal judiciary as well as the Drug Enforcement Administration and other federal law enforcement officials.

To the extent that law enforcement officials in this state attempt to act within the confines of Cruz, Florida courts will be burdened with lengthy pre-trial proceedings focusing not on an individual's guilt or lack therof, but on the conduct of the police as they attempt to reduce crime. Confidenial techniques used to ferret out crime will undoubtedly have to be disclosed so that judges can

determine whether they are acceptable.

In United States v. Janotti, 673 F.2d 578 (3rd Cir. 1982) the Court of Appeals traced the development of the entrapment defense as set forth by this Court in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210 77 L.Ed. 413 (1932); Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), Russell and Hampton. Noting that the Russell court had disapproved the expansion of the entrapment defense beyond this Court's opinions in Sorrells and Sherman and the Third Circuit stated:

> We must be careful not to undermine the Court's consistent rejection of the objective test of entrapment by permiting it to re-emerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reserved

> for the constitutional defense only the most intolerable government conduct. Id. at 608.

What the Janotti court worked scrupulously to avoid, the Florida Supreme Court has achieved, an objective entrapment test which is required by due process. It is ludicrous to suggest that the police activity found to be entrapment under the objective test propounded by the Florida Supreme Court reaches that demonstrable level of outrageousness at which a due process defense might be considered. See Hampton, supra at 48 L.Ed.2d 122 and compare United States v. Savage, 701 F.2d 867 (11th Cir. 1983); United States v. Kelly, supra; United States v. Janotti, supra; United States v. Myers, 635 F.2d 932, (2d Cir.), cert. denied, 449 U.S. 956 (1980).

Petitioner respectfully submits that the time has come for this Court to

address and resolve the confusion abounding nationwide caused by the intermingling of theories of objective entrapment and due process. Specifically this Court should grant the istant petitoin for writ of certiorari to review the application of Sorrells, Sherman, Russell and Hampton found in the instant cases, lest the Florida Supreme Court's decison become another contribution to the "extra baggage" which has rendered our system ineffective in dealing with crime.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant certiorari and reverse the decision of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ANN GARRISON PASCHALL, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 26th day of April, 1985, I served three copies of the Petition for Writ of Certiorari on Robert F. Moeller, Esq., Assistant Public Defender, 455 North Broadway Avenue, Bartow, Florida 33830 and James Miller, Esq., Assistant Public Defender, Duval County Courthouse, Room 407, Jacksonville, Florida 32202, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER.

APPENDIX

SUPREME COURT OF FLORIDA

No. 63,451

PEDRO A. CRUZ, Petitioner,

vs.

STATE OF FLORIDA Respondent.

[March 7, 1985]

EHRLICH, J.

This case is before us on appeal from a decision of the Second District Court of Appeal, 426 So.2d 1308 (Fla. 2 DCA 1983). The decision directly and expressly conflicts with State v. Casper, 417 So.2d 263 (Fla. 1 DCA), review denied, 418 So.2d 1280 (Fla. 1982). We take jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution. We disapprove the

district court's decision.

Tampa police undertook a decoy operation in a high-crime area. An officer posed as an inebriated indigent, smelling of alcohol and pretending to drink wine from a bottle. The officer leaned against a building near an alleyway, his face to the wall. Plainly displayed from a rear pants pocket was $150 in currency, paper-clipped together. Defendant Cruz and a woman happened upon the scene as passersby some time after 10 P.M. Cruz approached the decoy officer, may have attempted to say something to him, then continued on his way. Ten to fifteen minutes later, the defendant and his companion returned to the scene and Cruz took the money from the decoy's pocket without harming him in any way. Officers then arrested Cruz and he walked from the scene. The decoy situation did not involve the same modus

operandi as any of the unsolved crimes which had occurred in the area. Police were not seeking a particular individual, nor were they aware of any prior criminal acts by the defendant.

Cruz was charged by information with grand theft. Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), Cruz moved to dismiss the information, arguing that the arrest constituted entrapment as a matter of law. The trial court granted the motion to dismiss on the authority of State v. Casper, 417 So.2d 263 (Fla. 1 DCA), review denied, 418 So.2d 1280 (Fla. 1982). On appeal, the Second District Court of Appeal reversed, acknowledging its decision was in conflict with Casper.

The entrapment defense arises from a recognition that sometimes police activity will induce an otherwise innocent

individual to commit the criminal act the police activity seeks to produce. The United States Supreme Court has addressed the issue in four principal cases. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 US. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). The Third Circuit Court of Appeal offers a clear discussion of the historical development of the defense in the Supreme Court:

> In Sorrells v. United States, where the Court first recognized the defense of entrapment, the Court held the defendant was entitled to have the jury consider whether his acts of possessing and selling one-half gallon of whiskey in violation of the National Prohibition Act were instigated by the prohibition agent who implanted in the "mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that

[Government officials] may prosecute." 287 U.S. at 442, 53 S.Ct. at 212. The nature of the defense was outlined more fully when the Court next considered the defense a quarter of a century later in Sherman v. United States. Chief Justice Warren, writing for the majority of the Court, stated that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. at 372, 78 S.Ct. at 820. In concluding that entrapment had been established as a matter of law, the Court determined from the undisputed testimony of the prosecution's witnesses that the defendant was induced to sell narcotics by the government informer and that he was not predisposed, i.e., that he engaged in conduct he would not otherwise have attempted. The Court noted, "Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of lawenforcement officials." Id. (emphasis in original).

In United States v. Russell, the Court expressly disapproved of the decisions of the lower federal courts which had expanded the entrapment defense beyond the Court's opinions in Sorrells and Sherman. Instead,

> the Court reiterated that the defense was not of constitutional dimension, and reaffirmed its prior opinions that established that entrapment is a "relatively limited defense", 411 U.S. at 435, 93 S.Ct. at 1644, which cannot be used by a predisposed defendant. Most recently, in Hampton v. United States, a majority of the Court, in two separate opinions, upheld defendant's conviction arising from his sales of heroin which had allegedly been procured from a government informant, reaffirming once again the unavailability of the entrapment defense to a predisposed defendant.

United States v. Jannotti, 673 F.2d 578, 596 - 97 (3d Cir.), cert. denied, 457 U.S. 1106 (1982).

The entrapment defense thus normally focuses on the predisposition of the defendant. We adopted this view in State v. Dickinson, 370 So.2d 762 (Fla. 1972). The First District, in State v. Casper, 417 So.2d 263 (Fla. 1 DCA 1982), focused on predisposition when it found the "drunken

bum" decoy at issue here to constitute entrapment as a matter of law. In Casper, Jacksonville police set up a decoy situation legally indistinguishable from the scenario in this case. The Casper court held that the state must prove the defendant was predisposed to steal from the decoy and that predisposition can be found under four circumstances: (1) the defendant has prior convictions for similar crimes; (2) the defendant has a reputation for committing similar crimes; (3) police have reasonable suspicion the defendant was engaged in similar crimes; or (4) the defendant showed ready acquiescence to commit the crime suggested by police. Story v. State, 355 So.2d 1213 (Fla. 4th DCA), cert. denied, 364 So.2d 893 (1978). The Casper court found no evidence of the first two elements in that case. The

third element is irrelevant in the type of random expedition at issue here. The question thus boiled down to whether Casper "readily acquiesced" to the criminal scenario. The Casper court found that an otherwise unpredisposed passerby who chose to take the money did not acquiesce, but "succumbed to temptation . . . to the lure of the bait." 417 So.2d at 265. The Casper court therefore distinguished between "succumbing to temptation" and "readily acquiescing," and found that this is a question of law: where the trial judge finds the defendant succumbed to temptation, the matter shall not be put to a jury.

The Second District, in the case now before us, rejected this position. The Cruz court found that such a judgment is one for the jury to make. "[W]here, as

here, a defendant's intent or state of mind (i.e., predisposition) is an issue, that issue should not be decided on a motion to dismiss . . . ." 426 So.2d at 1310. Petitioner would have this court hold that where the only evidence of predisposition is the commission of the crime the police scenario was designed to ellicit, there is an insufficient showing of predisposition, as a matter of law. We do not agree.

We agree with the Second District that the question of predisposition will always be a question of fact for the jury. However, we also believe that the First District's concern for entrapment scenarios in which the innocent will succumb to temptation is well founded. To protect against such abuse, we turn to another aspect of entrapment.

Entrapment is a potentialy dangerous tool given to police to fight crime. "Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of crime." Sorrells v. United States, 287 U.S. 435, 453 - 54 (separate opinion of Roberts, J.). "The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and

they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Id. at 441 - 42 (opinion of the Court). "Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severist condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions." Id. at 441. These words of the United States Supreme Court, in its seminal Sorrells decision, outline the basis on which the entrapment practices of police are seen as a necessary evil but an evil to be controlled. The Sorrells Court concluded that the defense of entrapment protected against such

abuse.[1]

The entrapment defense adopted in Sorrells, focusing on the predisposition

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[1] The Supreme Court has subsequently come to realize that the entrapment defense may not be the only protection against police abuse in this context. In United States v. Russell, 411 U.S. 423 (1973) and Hampton v. United States, 425 U.S. 484 (1976), the Court recognized that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431 - 32 (quoted at 425 U.S. at 489, and citing Rochin v. California, 342 US. 165 (1952)(pumping defendant's stomach to retrieve swallowed contraband shocks the judicial conscience)).

In both Russell and Hampton the Court found no such due proces violation. However, at least two United States circuit courts have found due process violations in the entrapment context. Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); cf. United States v. Beverly, 723 F.2d 11 (3d Cir. 1983). At least five other circuits have recognized the possibility of due process violations, but have rejected finding such violations in the fact situations of the particular cases.

of the defendant, is termed the subjective view of entrapment. However, beginning with Justice Roberts' concurrence in Sorrells, a minority of the United States Supreme Court has favored what is termed the objective view. This view was well expressed by Justice Franfurter, in Sherman v. United States:

> The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power . . .
>
> . . . [A] test that looks to the character and predisposition of the defendant rather than the

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United States v. Garrett, 716 F.2d 257 (5th Cir. 1983), cert. denied, 104 S.Ct. 1910 (1984); United States v. Perez, 600 F.2d 782 (10th Cir. 1979); United States v. Leja, 563 F.2d 244 (6th Cir. 1977), cert. denied, 434 US. 1074 (1978); United States v. Quinn, 543 F.2d 460 (8th Cir. 1976); United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976).

conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society . . . Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply be cause he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicion, reasonable or unreasonable, of the police concerning the defendant's activities. Appeals to sympathy, friendship, the possibility of exhorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have

> committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected.

356 U.S. at 382 - 83 (Frankfurter, J., concurring in the result).

The subjective view recognizes that innocent, unpredisposed, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. In those cases, the subjective view allows conviction of predisposed defendants. The objective view requires that all persons so ensnared be released.[2]

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[2] While the objective view parallels a due process analysis, it is not founded on constitutinal principles. The justices of the United States Supreme Court who have favored the objective view have found that the court must "protect itself and the

Although the United States Supreme Court implies the objective and subjective views of entrapment are mutally exclusive, we find that they are not. The objective view is a statement of judicially cognizable considerations worthy of being given as much weight as the subjective view. This court has already provided such protection in a civil injunction case. State investigators hired two informants to solicit dental work from a dental technician not licenced to perform the work. Justice Terrell wrote:

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government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention." Sorrells, 287 U.S. at 457 (Roberts, J., in a separate opinion). Justice Frankfurter also found that a judge's decision using the objective view would offer significant guidance

> I do not think this court should sanction such apostasy from approved procedure. It is contrary to law and public policy for an officer or member of an administrative board to induce the commission of a wrong or a crime for the purpose of securing a pretext to punish it. . ..
>
> . . . All the evidence in this case was induced for pay and if given full face value, it leaves one in doubt whether defendant was doing the work of a dentist or a dental technician. In most cases due process and fair trial turn on procedure. I can think of nothing more disastrous to fair trial or more insolent to the safeguards with which it is protected, than a conviction secured solely on deliberately purchased evidence.

Peters v. Brown, 55 So.2d 334, 336 (Fla. 1951).

We do not foresee a problem in providing two independent methods of protection in entrapment cases. The New Jersey

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for future official conduct, while a jury verdict offers no such guidance. Sherman, 356 U.S. at 385 (Frankfurter, J., concurring in the result).

Supreme Court has found that the two tests of entrapment can coexist:

> In articulating [the entrapment doctrine], our Court has adopted two standards respecting entrapment. The traditional or subjective standard defines entrapment as law enforcement conduct which implants in the mind of an innocent person the disposition to commit the alleged crime, and hence induces its commission . . .. Under this traditional formulation, the defense of entrapment is limited to those defendants who were not predisposed to commit the crime induced by government actions.
>
> In recent years, however, this Court has fashioned a second, independent standard for assessing entrapment. It recognizes that when official conduct inducing crime is so egregious as to impugn the integrity of a court that permits a conviction, the predisposition of the defendant becomes irrelevant . . . This Court recently explained in Talbot [State v. Talbot, 71 N.J. 160, 167 - 68, 364 A.2d 9, 13 (1976)]:

> [A]s the part played by the State in the criminal activity increases, the importance of the factor of defendant's criminal intent decreases, until finally a point may be reached where the methods [employed] by the state to obtain a conviction cannot be countenanced, even though a defendant's predisposition is shown. Whether the police activity has overstepped the bounds of permissible conduct is a question to be decided by the trial court rather than the jury.

State v. Molnar, 81 N.J. 475, 484, 410 A.2d 37, 41 (1980)[3]

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[3] The Molnar court held that the objective test was to be administered by the trial court, as we hold here. Subsequent to its Molnar decision, the New Jersey court held that statutory law had superseded the common law, placing the decision on both the subjective and objective aspects of entrapment in the hands of the trier of fact. State v. Rockholt, 96 N.J. 570, 476 A.2d 1236 (1984). Even though the New Jersey court concluded that its common law paradigm had been supplanted, it noted that there may still be situations where the government conduct is so

We find, like the New Jersey court, that the subjective and objective entrapment doctrines can coexist. The subjective test is normally a jury question. The objective test is a matter of law for the trial court to decide.

The effect of a threshhold objective test is to require the state to establish initially whether "police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." Sherman, 356 U.S. at 382 (Frankfurter, J., concurring in the result). Once the state has established the validity of the police activity, the question remains whether

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outrageous that constitutional due process requires dismissal. See discussion at note 1, supra. There is no parallel to the New Jersey legislative action in Florida, and we conclude that the policy considerations of the Molnar decision remain valid in this case.

"the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells, 287 U.S. at 442 (1932). This question is answered by deciding whether the defendant was predisposed, and is properly for the jury to decide. In other words, the court must first decide whether the police have cast their nets in permissible waters, and, if so, the jury must decide whether the particular defendant was one of the guilty the police may permissibly ensnare.

To guide the trial courts, we propound the following threshhold test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the

interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

The first prong of this test addresses the problem of police "virtue testing," that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote in his separate opinion in Sorrells, "Society is at war with the criminal classes," 287 U.S. at 453 - 54. Police must fight this war, not engage in the manufacture of new hostilities.

The second prong of the threshhold test addressed the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include whether a government agent "induces or encourages

another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Model Penal Code §2.13 (1962).[4]

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[4] We note that, under this threshhold test, considerations which normally might not be recognized under the subjective test may be cognizable. In United States v. Jannotti, 673 F.2d 578, 596 - 97 (3d Cir. 1982), one of the ABSCAM cases, the court addressed the question of whether the size of bribes offered to city officials could be found to negate predisposition as a matter of law. The Third Circuit questioned whether the strength of the inducement could ever negate predisposition, but found that the size of the bribes in that case were insufficient, even if the strength of the inducement were a factor. Under the threshhold test we adopt here, the strength of the inducement is certainly a significant factor, since there could be a "substantial risk

Applying this test to the case before us, we find that the drunken bum decoy operation fails. In Cruz's motion to dismiss, one of the undisputed facts was that "none of the unsolved crimes occuring [sic] near this location involved the same modus operandi as the simulated situation created by the officers." Cruz, 426 So.2d

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that such an offense will be committed by persons other than those who are ready to commit it." While such a factor is thus cognizable, it does not always dictate a finding of entrapment as a matter of law, since, as the Third Circuit found in the context of its predisposition analysis, even substantial sums of money offered to city officials may be found to create no such substantial risk. Likewise, the relative "benignity" of the favor asked to the officials in Jannotti (defendants argued they only agreed to do that which they would have done anyway) was a question of fact for the jury in its determination of whether the defendants were predisposed, not a question of whether there was predisposition as a mattter of law. Once such issues are addressed in the context of the threshhold test, the problems inherent in attempting to determine whether certain facts tend to show predisposition as a matter of law are resolved.

at 1309. The record thus implies police were apparently attempting to interrupt some kind of ongoing criminal activity. However, the record does not show what specific activity was targeted. This lack of focus is sufficient for the scenario to fail the first prong of the test. However, even if the police were seeking to catch persons who had been "rolling" drunks in the area, the criminal scenario here, with $150 (paper-clipped to ensure more than $100 was taken, making the offense a felony) enticingly protruding from the back pocket of a person seemingly incapable of noticing its removal, carries with it the "substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Model Penal Code §2.13. This sufficiently addresses the Casper court's proper

recognition that entrapment has occurred where "the decoy simply provided the opportunity to commit a crime to anyone who succumbed to the lure of the bait." 417 So.2d at 265. This test also recognizes, as the Cruz court did, that the considerations inherent in our threshhold test are not properly addressed in the context of the predisposition element of the second, subjective test.

For the reasons discussed, we hold that the police activity in the instant case constituted entrpment a a matter of law under the threshhold test adopted here. Accordingly, we quash the district court decision.

It is so ordered.

BOYD, C.J., ADKINS, McDONALD and SHAW, JJ., Concur
OVERTON, J., Concurs specially with an opinion
ALDERMAN, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., specially concurring.

I fully concur with the majority opinion and, contrary to my dissenting colleague, I find that it is totally consistent with our opinion in State v. Dickinson, 370 So.2d 762 (Fla. 1979), and the United States Supreme Court cases of Sorrells v. United States, 287 U.S. 435 (1932), Sherman v. United States, 356 U.S. 369 (1958), and United States v. Russell, 411 U.S. 423 (1973). In my view, it is clear that the majority opinion does not depart from the "great weight of judicial authority in the United States." Further, it should be emphasized that in appropriate circumstances the issue of predisposition may be disposed of as a matter of law on a motion to dismiss. The United States Supreme Court so held in Sherman, in which it determined that predisposition did not

exist as a matter of law and concluded that there had been entrapment.

ALDERMAN, J., dissenting.

I would approve the decision of the Second District holding that where, as in the present case, a defendant's intent or state of mind, i.e., his predisposition to commit a crime, is an issue, that issue cannot be decided on a motion to dismiss. I disagree with this Court's adoption of a threshold objective test for entrapment, and I disagree that the police activity in the present case constituted entrapment as a matter of law.

The majority should adhere to our decision in State v. Dickinson, 370 So.2d 762 (Fla. 1979), wherein we explained that the essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense. The appropriate test for entrapment is a subjective test. In Dickinson,

we upheld the constitutionality of section 812.028(4), Florida Statutes (1977), which provided:

> It shall not constitute a defense to a prosecution for any violation of the provisions of §§ 812.012 - 812.037 that:
>
> * * *
>
> (4) A law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of §§812.012 - 812.037 in order to gain evidence against that person, provided such solicitation would not induce an ordinary law-abiding person to violate any provision of §812.012 - 812.037.

We said that this statute codifies entrapment as it now exists and held that here is clearly no constitutional prohibition against a law enforcement officer providing the opportunity for a person who has the willingness and readiness to break the law. We quoted with approval the following holding of the Supreme Court of the

United States in United States v. Russell, 411 US. 423, 435 - 46 (1973):

> Sorrells and Sherman both recognize "that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution . . .." Nor will the mere fact of deceit defeat a prosecution . . . for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play (citations omitted).

State v. Dickinson, 370 So.2d at 763. The thrust of the entrapment defense in Florida has been held to focus upon and should continue to focus upon the intent or predisposition to commit the crime. In Dickinson, we said that section 812.028(4) preserves the line between the predisposed criminal and the unwary innocent. Section

812.028(4) has not been amended since our decision in Dickinson.

We have not been asked by the parties to nor should we gratuitously adopt a new standard for entrapment. There are no compelling reasons why we should depart from long-established precedents. The new standard adopted by the majority has the effect of chaging the meaning of this defense. It is not constitutionally mandated and is contrary to the standard expressly recognized by the Florida Legislature and by the great weight of judicial authority in the United States. We should not expand the concept of entrapment beyond that explained in Dickinson and codified by statute.

I would approve the decision of the Second District.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Second District - Case No. 82-1502

Jerry Hill, Public Defender; and Robert F. Moeller, Bartow, Florida and Douglas S. Connor, Tampa, Florida , Assistant Public Defenders, Tenth Judicial Circuit,

for Petitioner

Jim Smith, Attorney General and M. Ann Garrison, Assistant Attorney General, Tampa, Florida,

for Respondent

Louis O. Frost, Jr., Public Defender and James Miller, Assistant Public Defender, Fourth Judicial Circuit, Jacksonville, Florida, amicus curiae

STATE of Florida, Appellant,

v.

Pedro A. CRUZ, Appellee.

No. 82-1502.

District Court of Appeal of Florida,

Second District.

Feb. 25, 1983.

In prosecution for grand theft, the Circuit Court, Hillsborough County, Fred J. Woods, J., granted defendant's motion to dismiss, and the State appealed. The District Court of Appeal, Scheb, J., held that issue of defendant's predisposition, as relating to his entrapment defense, should not have been decided on motion to dismiss.

Reversed and remanded.

1. Criminal Law 37(5)

There is no prohibition against police using decoys to present opportunity to those intending or willing to commit a crime.

2. Criminal Law 739.1(1)

Although entrapment can exist as a matter of law, where a defendant's intent or state of mind is an issue, that issue should not be decided on a motion to dismiss. West's F.S.A. RCrP Rule 3.190(c)(4).

3. Criminal Law 739.1(3)

In prosecution for grand theft arising from defendant's taking money from police decoy and in which defendant raised entrapment defense, issue of defendant's predisposition should not have been decided on motion to dismiss. West's F.S.A. RCrP Rule 3.190(c)(4).

Jim Smith, Atty. Gen., Tallahassee, and Ann G. Paschall, Asst. Atty. Gen., Tampa, for appellant.

Jerry Hill, Public Defender, Bartow, and Glenn E. Brown, Asst. Public Defender, Tampa, for appellee.

SCHEB, Judge.

The state filed an information charging Pedro A. Cruz with grand theft. Cruz moved to dismiss the charges under Florida Rule of Criminal Procedure 3.190(c)(4) on the ground that the undisputed facts showed he was entrapped as a matter of law. The trial court granted Cruz's motion on the authority of State v. Casper, 417 So.2d 263 (Fla. 1 DCA 1982).[1] We

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[1] The trial judge was bound by the First District's decision in State v. Casper. Chapman v. Pinellas County, 423 So.2d 578 (Fla. 2 DCA 1982); State v. Hayes, 333 So.2d 51 (Fla. 4 DCA 1976).

disagree with the First District's opinion in Casper. We reverse.

In Cruz's motion to dismiss, he contended that the following facts were undisputed and did not establish a prima facie case of guilt.

1. On March 1, 1982, certain members of the Tampa Police Department, specifically Officer Tommy Ellis, Officer John L. Counsman, Officer George L. Lease, Officer P. Saladino, and Officer M.D. Johnson, were conducting a decoy operation in the area of West Kennedy Boulevard and Brevard Street.

2. As part of said operation, Officer Tommy Ellis was dressed as a low income individual wearing blue slacks, a torn checked coat and a golf hat and was the decoy in the operation.

3. Officer Ellis was simulating a

state of intoxication, to wit: he was doused with alcohol, pretending to be drinking wine from a bottle, and was coughing and belching.

4. Officer Ellis was stationed near an alleyway, leaning against a building with his face to the building, and displaying currency in the amount of $150.00, the bills being paper-clipped together, from his right rear pants pocket.

5. The other officers involved in the operation were stationed in surrounding locations and were to provide back up assistance in apprehending anyone who may lift the money from the decoy's pocket.

6. At some time after 10:00 p.m., Officer Saladino, who was stationed in an alleyway by the decoy, observed the Defendant and a white female walking west on Kennedy Boulevard.

7. . . . it appeared that the Defendant approached the decoy and perhaps attempted to speak to him and then walked away from the decoy.

8. Approximately ten to fifteen minutes after that time, . . . the Defendant and the white female return to the location of the decoy, then Defendant paused a short time and then lifted the money from the decoy's pocket without physically harming the decoy in any way. . ..

12. . . . none of the unsolved crimes occuring (sic) near this location involved the same modus operandi as the simulated situation created by the officers.

13. . . . the decoy operation was not set up to catch any particular individual.

14. Said officers . . . had not observed the Defendant being engaged in any

criminal activity prior to the time the money was taken from the decoy, had no knowledge that the Defendant had previously engaged in similar theft related crimes, had no knowledge of any criminal record for the Defendant and had no knowledge of any reputation of the Defendant for criminal activities.

After hearing arguments by counsel and determining there was no dispute as to any material facts, the trial court granted Cruz's motion on the authority of Casper.

The essential facts in Casper, as recited by the court, are that:

> [T]he Jacksonville Sheriff's Office deployed a decoy . . .to apprehend potential robbers and thieves. The decoy was dressed in old clothes and doused himself with alcohol in order to appear to be under the influence of alcoholic beverages. He was in a semi-prone position on the sidewalk with several bills amounting to $150 protruding from his rear pant's pocket.

The bills were clearly visible to passersby and were stapled together. If someone approached the decoy and talked to him, he was to pretend that he was unconscious and could not respond. Several robberies and purse snatchings had occurred in the general area of the site of the decoy. However, no robberies or thefts had occurred at this specific site to the best knowledge of the Sheriff's office. None of the unsolved robberies or thefts involved the same type of victim or modus operandi of this case. The Sheriff's office had no suspects or identifications of possible suspects for the thefts and robberies and did not employ the decoy to catch any particular individual . . . the defendant walked along Duval Street and observed the decoy lying on the side of the street. The defendant walked by and then returned to the decoy, reaching down and removing the protruding money. He then walked on down the street, where the police arrested him. The police had not observed the defendant in the area prior to his arrest. They had no knowledge that he had previously engaged in similar theft-related crimes prior to this arrest.

417 So.2d at 264. On the basis of the above undisputed facts, the First District concluded that the defendant had been entrapped as a matter of law. The court held that under no reasonable construction could the state establish a prima facie case that the defendant showed a predisposition to commit the crime. We disagree.

In State v. Sokos, 426 So.2d 1044 (Fla. 2 DCA 1983), we recognized that the law relating to entrapment is correctly set forth in Casper, but we noted that we did not necessarily agree that those facts would constitute entrapment as a matter of law. In Sokos, Associate Judge Spicola, speaking for this court, noted that: "The entrapment defense 'focuses on the intent or predisposition of the defendant to commit a crime.' State v. Brider, 386 So.2d 818, 820 (Fla. 2 DCA 1980)(emphasis

supplied)." He explained that predisposition could be shown by establishing (1) prior criminal activity by the defendant; or (2) reasonable suspicion of his involvement in such activity; or (3) his ready acquiescence in the commission of the crime. See Story v. State, 355 So.2d 1213, 1215 (Fla. 4 DCA), cert. denied, 364 So.2d 893 (Fla. 1978).

[1] There is no prohibition against the police using decoys to present the opportunity to those intending or willing to commit a crime. See State v. Rouse, 239 So.2d 79 (Fla. 4 DCA 1970); Koptyra v. State, 172 So.2d 628 (Fla. 2 DCA 1965). Here, the police provided an opportunity for Cruz to commit a crime, but there is no showing that he was approached or encouraged by the police to do so. Thus, there is a question of fact as to whether

Cruz was predisposed to commit the offense.

[2,3] Entrapment can exist as a matter of law, Smith v. State, 320 So.d 420 (Fla. 2 DCA 1975), cert. denied, 334 So.2d 608 (Fla. 1976), but where, as here, a defendant's intent or state of mind (i.e., predisposition) is an issue, that issue should not be decided on a motion to dismiss under rule 3.190(c)(4). State v. Evans, 394 So.2d 1068 (Fla. 4th DCA 1981); State v. Rogers, 386 So.2d 278 (Fla. 2d DCA), petition for review denied, 392 So.2d 1378 (Fla. 1980); Cummings v. State, 378 So.2d 879 (Fla. 1st DCA 1979), cert. denied, 386 So.2d 635 (Fla. 1980); State v. J.T.S, 373 So.2d 418 (Fla. 2d DCA 1979); State v. West, 262 So.2d 457 (Fla. 4th DCA 1972).

As noted, the facts in this case are

nearly identical to those in Casper. We disagree with our sister court that such facts constitute entrapment as a matter of law. Our decision, we acknowledge, conflicts with State v. Casper.

Accordingly, we reverse the order dismissing the information and remand for further proceedings.

HOBSON, A.C.J., and LEHAN, J., concur.

SUPREME COURT OF FLORIDA

No. 63,832

STATE OF FLORIDA, Petitioner,

vs.

THADDEUS TYRONE HOLLIDAY, ET.AL.,
Respondents.

[March 7, 1985]

PER CURIAM.

We accepted jurisdiction based on the district court's certification of conflict. Art. V, §3(b)(4), Fla. Const. We resolve the conflict in Cruz v. State, No. 63,451, released today, and accordingly the decision here is approved.

It is so ordered.

BOYD, C. J., ADKINS, OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur, ALDERMAN, J. Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict

First District - Case Nos. AO-294, AO-325 & AO-326

Jim Smith, Attorney General and Barbara Ann Butler, Assistant Attorney General, Jacksonville, Florida,

for Petitioner

Louis O. Frost, Jr., Public Defender and James Miller, Assistant Public Defender, Jacksonville, Florida,

for Respondents.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

THADDEUS TYRONE HOLLIDAY, ALVIN L. TOWNSEND, and JAMES W. JACKSON,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CONSOLIDATED CASE NOS. AO-294; AO-325; AO-326

Opinion filed May 17, 1983.

An appeal from the Circuit Court for Duval County. Thomas D. Oakley, Judge.

Jim Smith, Attorney General, and Barbara Ann Butler, Assistant Attorney General, Jacksonville, for Appellant.

Louis O. Frost, Jr., Public Defender, and James T. Miller, Assistant Public Defender, Jacksonville, for Appellee.

PER CURIAM.

The State appeals from orders in three consolidated cases, entered on motions filed pursuant to Rule 3.190(c)(4), Fla. R. Crim. P., dismissing informations

against defendants on a finding of entrapment as a matter of law. These appeals question the application of this Court's decision in State v. Casper, 417 So.2d 263 (Fla. 1st DCA, 1982), cert. den., 418 So.2d 1280 (Fla. 1982), especially in light of the refusal by our sister court to follow that decision in State v. Sokos, __ So.2d __, 8 FLW 366 (Fla. 2d DCA, January 19, 1983) and State v. Cruz, __ So.2d __, 8 FLW 647 (Fla. 2d DCA, February 25, 1983). Each case involved use of a "decoy operation," and the undisputed facts in all are substantially similar.

Holliday (Case No. AO-294): On April 28, 1981, Jacksonville sheriff's office, pursuant to a Special Investigation Section operation, deployed a decoy on North Main Street in Jacksonville for the purpose of investigating criminal activity

involving potential robberies and thefts. Several robbberies and purse snatchings had occured in this general area. The decoy wore old clothes, doused himself with alcohol to appear intoxicated, and lay in a semi-prone position on the sidewalk. As directed by his superiors, the decoy had placed $150 in bills in his rear pants pocket so as to be clearly visible to passersby and pretended to be unconscious. As directed, he was unresponsive to any physical or verbal acts toward him. Holliday walked by the decoy and observed him. He then walked back and forth by the decoy several times more, and finally reached down and took the exposed money. Holliday then ran away, but was apprehended by police a short distance down the street. As police approached, he threw the money on the ground and admitted having taken it because he was broke.

After Holliday's arrest, several other persons took the "bait" offered by the decoy and were arrested. The police had no knowledge that Holliday had previously engaged in similar theft-related crimes and were not specifically looking to arrest Holliday for any suspected thefts. Several robberies and thefts had occurred in this area, however, involving suspects matching Holliday's general description and involving similar victims and modus operandi. Statistics on the decoy operation kept by the sheriff's office indicated that more than 50% of passersby contact with the decoys did not result in theft or robbery, but that most persons attempted to assist the decoy and help him retain his money.

Townsend (Case No. AO-325): The decoy operation resulting in Townsend's arrest occurred on October 16, 1981, near

the same area, and involved a factual situation similar to Holliday, with the following slight differences. This time, the decoy did not douse himself with alcohol or appear to be intoxicated, and the money was not stapled together. Townsend nevertheless took all of the bills and walked away. He admitted to taking the money when arrested, but did not say why. Townsend had been arrested in August 1979 for burglary, but the State dropped the case on September 6, 1979, and Townsend was not suspected of thefts involving this modus operandi.

Jackson (Case No. A0-326): This decoy operation also occurred on October 16, 1981, in the same general location. The factual situation was similar to that involving Holliday, with the differences noted in the Townsend case. Jackson,

however, had no prior arrests.

The three cases were carried on the trial court's calendar awaiting decision in State v. Casper, supra. The trial court granted the motions to dismiss on the authority of that decision.

On this appeal, the state argues that sufficient material differences exist between Casper and the cases under consideration to make Casper distinguishable and, thus, not controlling. We disagree. The controlling facts and circumstances in these cases do not materially differ from those upon which the court in Casper held as follows:

> The State may demonstrate predisposition by proof of the defendant's prior criminal activities, his reputation for such activity, or his ready acquiescence in the commission of the crime. Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978). Moreover, evidence of prior

unlawful acts, similar to the one with which the defendant is charged, is ordinarily admissible to rebut a defense of entrapment. See, e.g., Drayton v. State, 292 So.2d 395 (Fla. 3rd DCA 1974), cert. denied 300 So. 2d 900 (Fla. 1974); Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974), cert. denied, 294 So. 2d 91 (Fla. 1974). Upon this record, we are unable to find any evidence which would tend to show predisposition so as to defeat a motion to dismiss under Rule 3.190(c)(4), and the State did not traverse the facts as stated in defendant's motion. There is no evidence of any prior conduct of the defendant that would have shown predisposition. There is no evidence that he was engaging in criminal activity before he took the money from the decoy. See Dupuy, supra. No ready acquiescence is shown; on the contrary, the defendant's acts, as stated in the motion, demonstrate only that he succumbed to temptation. The record, as such, reveals that the decoy did not detect or discover. nor could he reasonably be intended to discover, the type of crime the police were attempting to prevent by the use of decoy, i.e., robberies and purse snatchings. Indeed, lifting some money protruding from the pocket of a

> seemingly unconscious, drunken bum is just not sufficiently similar to either robbery or purse snatchings. Upon these facts, the decoy simply provided the opportunity to commit a crime to anyone who succumbed to the lure of the bait. Accordingly, we uphold the trial court's ruling that, as a matter of law, the defendant was entrapped. In doing so, we do not wish to proscribe any use of the police decoy procedure. We hold only that, where the defense of entrapment is raised, the State must demonstrate [or, as in this case, allege] facts tending to show a predisposition on the accused's part to commit the crime. Absent such a showing or allegation, as the case may be, we will have no alternative but to conclude that the accused's entrapment defense has merit and prevents the conviction for the offense. (417 So.2d at 265)

The State also argues that, unlike Casper, here it filed not only a demurrer, but also a traverse which specifically denied certain facts alleged in the motions, and alleged additional material facts which the State contended were in dispute.

The State relies on State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979) and other similar decisions for the proposition that once a traverse specifically denying material facts is filed, automatic denial of the motion is required. In this case, however, with the approval of the trial court, the State stipulated to the defendants' adoption, as part of their motions to dismiss, of all evidentiary facts alleged in the State's traverse and denial. As a result, no evidentiary facts remained in dispute, and the issue left for decision was whether predisposition to commit the crime was sufficiently shown by the evidence to raise a jury question or should be decided against the State as a matter of law under Casper. We see nothing improper in this procedure. A traverse by the State, in order to be

effective, must constitute a good faith dispute of material facts. Cf., Fox v. State, 384 So.2d 226 (Fla. 3rd DCA 1980); Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977); State v. Kemp, 305 So.2d 833 (Fla. 3d DCA 1975). In stipulating to the amendment of defendant's motions, the State agreed it had no good faith dispute with the facts as so amended.

Finally, the State asks that we limit or recede from the holding in Casper and reverse the orders below in view of the decisions by the Second District Court of Appeal in State v. Sokos, supra, and State v. Cruz, supra. We recognize that those decisions, being based on substantially similar factual situations, refused to follow Casper on the premise that intent or state of mind concerning predisposition is not an issue to be decided as a matter

of law on motion to dismiss under Rule 3.190 (c)(4). While this panel of the Court has some doubt as to the propriety of disposing of this issue on a Rule 3.190 (c)(4) motion, nevertheless we are constrained to follow Casper. The orders appealed are affirmed.

In view of the apparent widespread use of the decoy operations involved in these cases by law enforcement agencies around the state of Florida, and the acknowledged conflict between decisions, we certify to the Supreme Court, pursuant to Article V, Section 3(b)(4), that this decision is in direct conflict with the decisions of the District Court of Appeal, Second District, in State v. Sokos, __ So.2d __, 8 FLW 366 (Fla. 2d DCA, January 19, 1983) and State v. Cruz, __ So.2d __, 8 FLW (Fla. 2d DCA, February 25, 1983).

BOOTH, L. SMITH, and ZEHMER, JJ., CONCUR